

A Moses Chinedu Nwasu v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO
K-05-219-09 OF 2012

AZAHAR MOHAMED, ROHANA YUSUF AND ZAKARIA SAM JJCA
21 JANUARY 2014

Criminal Law — Dangerous drugs — Trafficking — Trafficking in 14,302.6g of cannabis — Conviction and sentence — Appeal against — Drugs found in bag pulled by appellant at bus terminal — Physical possession, exclusive control and knowledge of drugs established — Whether presumption under s 37(d) of the Dangerous Drugs Act 1952 properly invoked — Failure to rebut presumption — Finding of trafficking — Whether defence of innocent carrier not made out

Based on information received, SP4 (Insp Samsualan) organised an ambush at the Shahab Perdana bus terminal and arrested the appellant in the concourse of the bus terminal pulling a black bag on wheels ('exh P6'). Using a set of keys found in the appellant's jeans pocket, SP4 opened exh P6 and found 15 slabs containing 14,302.6g of cannabis. The appellant was charged with trafficking in 14,302.6g of cannabis under s 39B(2) of the Dangerous Drugs Act 1952 ('DDA'). In his defence the appellant claimed the exh P6 belonged to a Malay man who he had befriended at the bus terminal. The learned JC held that the appellant failed to raise any reasonable doubt on the prosecution case and found the appellant guilty of the charge. The appellant appealed against conviction and sentence on the grounds that: (a) the learned JC misdirected in invoking s 37(d) and s 2 of the DDA when he acknowledged in his judgment that there was no physical possession and no knowledge on the part of the appellant; and (b) that the JC failed to give due weight to the appellant's defence.

Held, dismissing the appeal:

- H** (1) The appellant at the time of arrest was having with him exh P60 where the drugs were found. The appellant was seen, all by himself pulling the black bag towards the concourse of the bus terminal. This fact was sufficient to infer control and possession of the drugs on the part of the appellant (see para 7).
- I** (2) The JC whilst saying that there was no physical possession proven continued further in his judgment to say that the evidence taken on a whole inferred or suggested that the appellant had the control and custody of the drugs, when he was caught with the bag containing drugs in his hand. After having found so the JC invoked the presumption of possession under s 37(d) of the DDA (see para 8).

- (3) The appellant was exclusively in custody and control of the exh P6 containing the drugs. He was holding the said bag when he was arrested. This entitled the invocation of s 37(d) of the DDA (see para 9). A
- (4) Having invoked the presumption under s 37(d) the appellant would be deemed to have in his possession and having the necessary knowledge of what he was carrying in the black bag were drugs. There was sufficient evidence to support a prima facie finding of trafficking independent of the presumption under s 37(da) of the DDA (see para 11). B
- (5) The appellant's defence of innocent carrier was not made out because the JC found credible evidence by SP4 and SP5 that the appellant was all by himself at the time he was walking towards the bus terminal. The appellant had not rebutted the presumption of possession nor was any reasonable doubt raised on the prosecution's case (see para 16). C

[Bahasa Malaysia summary]

Berdasarkan maklumat yang diterima, SP4 (Insp Samsualan) merancang serang hendap di terminal bas Shahab Perdana dan menangkap perayu di ruang legar terminal bas menarik beg hitam beroda ('eksh P6'). Mengguna set kunci yang dijumpai di dalam poket jeans perayu, SP4 membuka eksh P6 dan mendapati 15 papak mengandungi 14,302.6g kanabis. Perayu dituduh mengedar dadah kanabis sebanyak 14,302.6g di bawah s 39B(2) Akta Dadah Berbahaya 1952 ('ADB'). Dalam pembelaannya perayu mendakwa eksh P6 kepunyaan lelaki Melayu yang dia berbaik-baik di terminal bas. Pesuruhjaya kehakiman ('PK') yang bijaksana memutuskan bahawa perayu gagal untuk membangkitkan apa-apa keraguan munasabah ke atas kes pihak pendakwaan dan mendapati perayu bersalah terhadap tuduhan tersebut. Perayu merayu terhadap sabitan dan hukuman atas alasan bahawa: (a) PK yang bijaksana salah arah dalam membangkitkan s 37(d) dan s 2 ADB apabila beliau menerima dalam penghakimannya bahawa tidak terdapat milikan fizikal dan perayu tidak mempunyai pengetahuan; dan (b) bahawa PK gagal memberi pertimbangan sewajarnya kepada pembelaan perayu. D
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Diputuskan, menolak rayuan:

- (1) Perayu semasa penangkapan memegang eksh P60 di mana dadah tersebut didapati. Perayu dilihat dengan sendirinya menarik beg hitam ke ruang legar terminal bas. Fakta ini mencukupi untuk membuat kesimpulan kawalan dan milikan dadah tersebut ke atas perayu (lihat perenggan 7). H
- (2) PK sementara itu menyatakan bahawa tidak terdapat milikan fizikal dibuktikan meneruskan selanjutnya di dalam penghakimannya menyatakan bahawa keterangan yang diambil atas keseluruhannya menyimpulkan atau mencadangkan bahawa perayu mempunyai kawalan dan jagaan dadah tersebut, apabila dia ditangkap dengan beg yang I

- A mengandungi dadah di dalam tangannya. Selepas didapati sedemikian PK membangkitkan anggapan milikan di bawah s 37(d) ADB (lihat perenggan 8).
- (3) Perayu secara eksklusif dalam jagaan dan kawalan terhadap eksh P6 yang mengandungi dadah. Dia memegang beg tersebut apabila dia ditangkap.
- B Ini memberikan hak kepada pembangkitan s 37(d) ADB (lihat perenggan 9).
- (4) Dengan membangkitkan anggapan di bawah s 37(d) perayu akan dianggap mempunyai milikan dan mempunyai pengetahuan yang perlu mengenai apa yang dia bawa di dalam beg hitam tersebut adalah dadah.
- C Terdapat keterangan yang mencukupi untuk menyokong dapatan prima facie pendedaran bebas anggapan di bawah s 37(da) ADB (lihat perenggan 11).
- (5) Pembelaan perayu mengenai pembawa tidak salah bukan dibuat kerana PK mendapati keterangan yang boleh dipercayai oleh SP4 dan SP5 bahawa perayu dengan sendirinya pada masa tersebut berjalan ke arah terminal bas. Perayu tidak mematahkan anggapan milikan ataupun apa-apa keraguan munasabah dibangkitkan ke atas kes pihak pendakwaan (lihat perenggan 16).]
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Notes

For cases on trafficking, see 4(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 205–300.

F Cases referred to

Ganapathy a/l Rengasamy v PP [1998] 2 MLJ 577, FC (refd)
Ibrahim bin Mohamad dan satu lagi lwn Pendakwa Raya [2011] 6 MLJ 387;
 [2011] 4 CLJ 113, CA (refd)
Muhammed bin Hassan v PP [1998] 2 MLJ 273; [1998] 2 CLJ 170, FC (refd)
 G *PP v Manaf bin Muhammad Hassan* [2006] 3 MLJ 193, FC (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 37(d), 37(da), 39B(2)

H Appeal from:

Criminal Trial No 45A-52–12 of 2012 (High Court, Alor Setar)

Kitson Foong (Kit & Associates) for the appellant.

Ahmad bin Bache (Deputy Public Prosecutor, Trial and Appeal Division) for the respondent.

I**Rohana Yusuf JCA (delivering judgment of the court):**

[1] At the High Court in Alor Setar the appellant was charged and convicted

of trafficking in 14,302.6g of cannabis under s 39B(2) of the Dangerous Drugs Act 1952 ('DDA') and was sentenced to the mandatory death sentence under the Act. His appeal came before us on 24 October 2013 which by a unanimous decision we have dismissed. We now give our reasons for our decision.

BRIEF FACTS

[2] The brief facts of this case are well encapsulated in the grounds of judgment of the learned judicial commissioner ('JC'). The prosecution's case was premised on information received on 25 March 2011 around 9pm by SP4 (Insp Samsulan bin Samsudin) on drugs trafficking activity which was to take place at the bus terminal Shahab Perdana in Alor Setar, involving an African national. Accordingly, SP4 organised an ambush. At 10.30pm SP4 detected the appellant in the concourse of the bus terminal pulling a black bag on wheels (exh P6) and carrying a yellow bag of clothing (exh P50).

[3] SP4 arrested the appellant. At the point of arrest the appellant dropped both the bags. Nothing incriminating was found on the physical examination of the appellant's body. A set of keys found in his jeans pocket was used by SP4 to open exh P6. In the bag SP4 found 15 slabs, suspected to be drugs. Upon analysis by the chemist the 15 slabs were found to contain 14,302.6g of cannabis. Also found in the bag were some t-shirts and some shirts.

[4] At the end of the prosecution's case the learned JC came to a finding that a prima facie case was made out. The learned JC called upon the appellant to enter his defence. He gave unsworn statement from the dock. In his written statement he narrated his version as follows; he was travelling to Alor Setar in a taxi with another Malay man who introduced himself as Jack. They had a small conversation and upon arriving Alor Setar the appellant said he sought Jack's assistance to guide him to get bus ticket to Kuala Lumpur since that was his first trip to Malaysia. He was waiting for Jack to obtain the ticket when the plain clothed police team came and arrested him. He was carrying the yellow bag while the black bag which according to him belong to Jack, was on the floor. He said the black bag was not locked. When the police opened and found the drugs in the black bag he was shocked to see the drugs and repeatedly told the police that the black bag did not belong to him.

[5] At the conclusion of the trial, having given due consideration to the appellant's statement, the learned JC held that the appellant failed to raise any reasonable doubt on the prosecution case and found the appellant guilty of the

A charge.

GROUNDS OF APPEAL

B [6] The appellant in his petition of appeal listed out in great details his grounds of appeal. In the submission before us learned counsel for the appellant Encik Kitson Foong however confined his submission to two main issues. First he argued that the learned JC misdirected in invoking ss 37(d) and 2 of the DDA when he acknowledged in his judgment that there was no physical possession and no knowledge on the part of the appellant. Learned
C counsel relied on the Federal Court decision of *Ibrahim bin Mohamad dan satu lagi lwn Pendakwa Raya* [2011] 6 MLJ 387; [2011] 4 CLJ 113. His next ground of appeal is his complaint that the learned JC failed to give due weight to the defence raised by the appellant.

D [7] In coming to a conclusion that a prima facie case was made out we find the learned JC had carefully deliberated and given his maximum evaluation of the evidence before him. Having done so the learned JC found the appellant at the time of arrest was having with him exh P60 where the drugs were found.
E The the learned JC found the evidence of SP4 and SP5 that the appellant was seen, all by himself at that time pulling the black bag towards the concourse of the bus terminal, which he relied upon in coming to his conclusion to be credible. This fact according to the learned JC was sufficient to infer control and possession of the drugs on the part of the appellant.

F [8] We agree with the finding made by the learned JC on this issue. We are of the view that learned counsel had not done justice to the judgment of the learned JC when he highlighted the portion of the judgment that reads. 'Berdasarkan keterangan yang di kemukakan ini saya dapati pihak pendakwa
G ini tidak dapat membuktikan OKI secara fizikalnya mempunyai pemilikan ke atas dadah-dadah yang di jumpai di dalam beg P6 tersebut' to support his contention that the learned JC held that physical possession was not proven. Upon our reading of the written judgment we find the learned JC whilst saying that there was no physical possession proven continued further in his judgment
H to say that the evidence taken on a whole infer or suggest that the appellant had the control and custody of the drugs, when he was caught with the bag containing drugs in his hand. After having found so the learned JC invoked the presumption of possession under s 37(d) of the DDA.

I [9] We agree with the learned JC that the appellant was exclusively in custody and control of the exh P6 containing the drugs, on the evidence and the facts of this case. He was holding the said bag when he was arrested. This fact was in our view correctly relied by the learned JC which entitled him to invoke s 37(d) of the DDA. We find the factual matrix of this case different

from the Federal Court case of *Ibrahim bin Mohamad dan satu lagi lwn Pendakwa Raya* [2011] 6 MLJ 387; [2011] 4 CLJ 113 cited by learned counsel. In that case the drugs was found in a vehicle driven by the first accused with the second accused as a passenger. The second accused was previously summoned for driving without license in Kulim Kedah about six months prior to the date of his arrest. Whereas, neither of them was the registered owner but the registered owner was not called to testify which led to a gap as to how the vehicle came into custody and control of the accused. No explanation was tendered as to what had happened to the vehicle from the date the second accused was summoned in Kulim up to the date the vehicle was stopped at the road block.

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[10] In the present case when the appellant was caught with the exh P6 in his hand, no other inference could have been made but that he was in custody and control of the bag.

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[11] Having invoked the presumption under s 37(d) the appellant would be deemed to have in his possession and having the necessary knowledge of what he was carrying in the black bag were drugs. There was sufficient evidence to support a prima facie finding of trafficking independent of the presumption under s 37(da) of the DDA having regard to the definition under s 2 of the DDA. The appellant was arrested in the act of carrying from one place to another cannabis weighing 14,302.6g, an amount much larger than was likely be used for his own consumption. We agree with the learned deputy public prosecutor that the approach by the learned JC was correct in law as decided by the Federal Court in *Public Prosecutor v Manaf bin Muhammad Hassan* [2006] 3 MLJ 193, viz that a reliance on a presumption under s 37(d) and a finding of trafficking under s 2 of the DDA would not offend the rule against double presumption as laid down in the case of *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273; [1998] 2 CLJ 170.

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[12] We now come to the other complaint raised by the appellant in that the learned JC failed to consider his defence in arriving at his guilt. It is the appellant's case that his defence was an innocent carrier whereas the learned JC in his judgment states that it is a bare denial.

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[13] First, in our view it is pertinent to note that the appellant chose to give statement from the dock. The learned JC had rightly reminded himself that such a statement was not subjected to cross-examination and the truth of which cannot be tested and hence it does not have high probative value. That notwithstanding, the learned JC had given due consideration to the statement by the appellant as to whether the statement made by the appellant had raised any reasonable doubt on the prosecution's case.

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- A [14] The learned JC weighed the statement of the appellant against the evidence adduced by SP4 and SP5. In their testimonies SP4 and SP5 saw the appellant pulling the black bag towards the concourse of the bus terminal, and that the appellant he was all by himself. SP4 testified that the keys found in the appellant's pocket was used to open the black bag whereas, the appellant said
- B the black bag was not locked. In assessing the defence case the learned JC found that the testimonies of SP4 and SP5 are credible and clear in establishing the offence committed by the appellant.
- C [15] Learned counsel contended that the learned JC misdirected in saying that the defence raised by the appellant was in fact a mere denial when the appellant raised a defence of an innocent carrier. In the result he contended the learned JC failed to apply the principle as laid down by the Federal Court in *Ganapathy all Rengasamy v Public Prosecutor* [1998] 2 MLJ 577.
- D [16] We find the learned JC had applied the correct principle of law in determining whether or not at the conclusion of the trial the appellant had raised any reasonable doubt on the prosecution's case. In our view a defence of innocent carrier was not made out because the learned JC found credible
- E evidence by SP4 and SP5 that the appellant was all by himself at the time he was walking towards the bus terminal. Thus in our view the learned JC has not misdirected when he said the defence raised was a mere denial instead of innocent carrier. What matters would be whether or not a reasonable doubt has been casted upon the prosecution's case by the appellant.
- F [17] From the totality of the evidence adduced we are satisfied that we agree with the finding of the learned JC that there is ample evidence and necessary inference that the appellant had the control and custody of the drugs. The appellant had not rebutted the presumption of possession nor has any
- G reasonable doubt been raised on the prosecution's case. This case is based on the finding of facts by the trial court. We have no reason to disturb the finding of facts by the learned JC. We had therefore dismissed the appeal and confirmed the conviction and sentence.
- H *Appeal dismissed.*

Reported by Kanesh Sundrum

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